

SUBJECT: LOS Conference Strategies

The Issue

The precise issue addressed by this paper is whether the risk of failure of a negotiating effort by the US is so high and the consequences of not adopting alternate strategies now are so great that we should move immediately to implement them.

Background

After a year of inter-agency review, all departments and agencies, including senior White House staff, have reviewed US interests, objectives and options at the Law of the Sea Conference. The IG has forwarded a decision memorandum to the White House, which sets forth two broad options for Presidential decision. The first is to withdraw from the Conference and attempt to put in place an alternative regime to the one being negotiated at the Law of the Sea Conference. The second option is to continue to negotiate as effectively as possible subject to specified guidelines with a view toward improving the Law of the Sea treaty so as to make it acceptable to the Administration and the Senate. All agencies have agreed that the second option best protects US interests. The Department of Interior believes, however, that the second option should contain a clearly delineated bottom line.

There is, however, a view held by some that it is impossible for the US to achieve an acceptable treaty at the Law of the Sea Conference and that particular attention should be paid to contingency strategies. The purpose of this paper is to address those strategies and to ensure that senior decision makers have an opportunity to consider them in connection with the decision memorandum. All agencies would agree that strategies need to be prepared in the event that the US fails to improve the treaty sufficiently to sign and seek Senate advice and consent to ratification.

Strategies on the Assumption that US Efforts Will Not Adequately Improve the Deep Seabed Mining Provisions of the Law of the Sea Treaty.

1. Withdrawal from the Conference with our allies before the next session.

Commentary:

- a. While no effort has been made at the highest levels to seek allied withdrawal from the Conference, at this stage all of our senior experts and experienced observers believe this to be impossible. Our allies have other important

State Dept. review completed

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non-deep seabed law of the sea interests to protect and are concerned with their relationships with developing countries. As a result, they will not simply walk out. Furthermore, an unsuccessful US attempt to disengage the allies would be a costly political irritant precisely when we are seeking their cooperation on major security, economic and political issues (e.g., Poland, Cuba, Libya).

- b. Even if our allies could somehow be convinced to withdraw from the Conference with us, the next step would be to try to set up an alternative regime for seabed mining. However, the highest probability is that most of the rest of the world, including many Western countries, will proceed to conclude a comprehensive law of the sea treaty providing for an international organization to regulate deep seabed mining. Mining rights would be in serious legal doubt and mining would be unlikely to occur until there was either a negotiated accommodation between the two competing regimes or international adjudication. Our chances of prevailing in an international adjudication are highly problematical.
 - c. Walking away now would leave the Soviets at the table with the Third World, giving them a windfall opportunity to influence the Conference in ways adverse to national security and economic interests.
 - d. A strongly adverse international reaction affecting our bilateral and multilateral interests with a number of countries could be expected in the event of our withdrawal.
2. Withdrawal from the Conference without our allies before the next session.

Commentary:

- a. This action would almost certainly produce in 1982 an adopted treaty. At best, it would be more or less in its present form. We would then have to attempt with little likelihood of success to persuade our allies not to sign it. This might be easier to do than getting them to withdraw from the Conference since, if we reject the treaty, the financial burdens normally carried by the US would have to be carried

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in large measure by our allies. They might be reluctant to assume this burden. Nevertheless, the other criticisms of strategy one still pertain and deep seabed mining might not occur.

3. Negotiate with the intention of preserving our ideological positions on NIEO issues and then pulling out of the Conference and announcing non-support for the treaty.

Commentary:

- a. This approach would involve taking a public posture at the Conference that lays out our maximum ideological position and is, in effect, one means of carrying out Option I as set forth in the decision memorandum. It would be designed to force the Conference to choose a system that is consistent with US principles or face the certainty of US withdrawal. It would be perceived by most countries as a US decision not to engage in serious negotiation. The conference would undoubtedly conclude we are seeking to have our position rejected so as to give us a viable excuse for walking out. In practice this approach would be the equivalent of the second strategy and is, therefore, subject to the same criticism.
 - b. This strategy would foreclose the option of improving the treaty and could result in retaliatory action by developing countries to vote through amendments which would erode the advantageous navigation/overflight provisions of the current Draft Convention.
4. Make a maximum effort to negotiate a treaty that meets US interests and minimizes objectionable NIEO principles, preserving our option whether or not to sign and participate in the treaty.

Commentary:

- a. This strategy would be designed to preserve non-deep seabeds provisions that we support, particularly important navigation and overflight rights which involve our national security. It would probably result in important improvements to the treaty, but they could still fall short of all the US objectives. Without a significant

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change in present views which we consider highly unlikely, this is the only approach our allies appear to be prepared to support. Even if the treaty were not improved enough for US signature, this approach would stand the best chance of preventing erosion of the present advantageous navigational provisions of the treaty.

- b. This approach assumes that the US will decide later whether to sign the resulting treaty. If we do not sign, a strategy could then be implemented to prevent our allies from signing and to persuade them to join us in establishing an alternative regime. (See strategy 6).
- c. This approach will enable us to conclude with our allies the interim reciprocal regime, providing for conflict resolution and recognition of exploration licenses only, which we have been negotiating. They have made it clear that they would not sign such an agreement if the US withdraws from the negotiation.

5. Negotiate with the intention not to sign.

Commentary:

- a. This strategy could result in modest improvements to the treaty. It is, however, subject to the risk and criticism, should such a decision become known, of placing the US in a position of negotiating in bad faith. No one believes that this decision could be taken without high risk of it leaking or becoming obvious to other negotiators, and it therefore could greatly impair the stature and respect of the Reagan Administration as perceived by other nations. It could also lead quickly to retaliatory action including damaging amendments to the navigational provisions of the text.
6. Negotiate at the Law of the Sea Conference in a serious effort to make significant improvements to the treaty, while at the same time negotiating with our allies to produce a reciprocating states regime which could, with further development serve as the basis for an alternative, or mini-treaty regime if our efforts at the Conference failed to produce an adequate result.

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Commentary:

- a. The first stage of this strategy is being pursued right now through the reciprocal regime negotiations. It has been made clear to us by our allies that the US must be a bona fide participant at the Law of the Sea Conference and must be seriously and reasonably attempting to negotiate changes in the law of the sea treaty (i.e., that the US pursue Option II as described in the decision memorandum). Moreover, our allies have stressed that they are only willing to participate in a reciprocating states regime that is interim to a law of the sea treaty because of the importance they attach to achieving an acceptable treaty.
- b. It is also open to question whether, if the Law of the Sea Conference ultimately fails from our perspective, an elaborated reciprocal regime or mini-treaty would adequately protect our deep seabed mining interests. Most developing countries, the Eastern block and many Western countries are still likely to create an International Seabed Authority with regulatory power over deep seabed resources. This strategy is therefore subject to the same criticism as preceding strategies.

Conclusion

It may not be possible fully to protect US interests with any of these strategies. Strategies 4 and 6 offer the best opportunities to satisfy US interests. They are essentially the same with respect to our efforts at the Conference but have been presented separately for the purpose of highlighting analysis of our ability to establish an alternative regime.

If our sole or primary interest is to avoid US participation in a treaty which accelerates or enhances international acceptance of NIEO concepts, and we do not place importance on preventing erosion of the navigation and overflight provisions or on the viability of our future capacity to mine deep seabed resources under the US flag in a secure legal framework, and if we are not seriously concerned with world opinion, then any of these strategies will accomplish this objective. Strategy 5, however, would subject the US to the legitimate criticism of negotiating in bad faith, would undoubtedly become known, and therefore should be rejected.

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Strategies 4 or 6 appear to be the only strategies which would avoid the serious disadvantages to US interests described above and which would preserve our option to stay out of the treaty and implement an alternative at a later date. The other strategies will be equally available after the next session of the Law of the Sea Conference and could be addressed at that time. In any case, none of them except for unilateral withdrawal could be implemented effectively in the time remaining before the Law of the Sea Conference begins in early March.

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